

ORIGINAL

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AMY J HUNLEY  
CLERK OF SUPERIOR COURT  
By                      Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA	)	Case No. CR201800277
	)	
Plaintiff,	)	JUDGE CARDINAL, DIV. I
	)	
vs.	)	<b>RESPONSE TO DEFENDANT'S</b>
	)	<b>MOTION FOR A NEW TRIAL</b>
<b>STACEY HOWER,</b>	)	
	)	
Defendant.	)	

THE STATE OF ARIZONA, through Brian M. McIntyre, Cochise County Attorney, and Jason Lindstrom, his Deputy, pursuant to Rule 24.1 of the Arizona Rules of Criminal Procedure, moves this Court to deny the Defendant's motion for a new trial as the matter is not yet ripe for consideration.

On a motion for a new trial the Court has the authority and may order a new trial after the verdict. Rule 24.1(a) (emphasis added). Parties are offered the opportunity to file a motion for a new trial within ten (ten) days of the verdict. Rule 24.1(b). The Defendant's motion is not ripe and should be denied at this time.

In addition, to grant the Defendant's motion for a new trial or to entertain a new motion for a mistrial would be done contrary to the Defendant's interests. The jury is still deliberating. There can no assurance to either party that the verdict will result as guilty or as an acquittal. An acquittal on any count would preclude the State from prosecuting the Defendant as jeopardy would attach as to those counts.

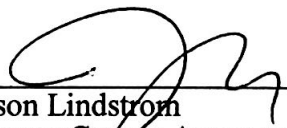
And finally, prior to declaring a mistrial, the trial court should determine whether there were feasible alternatives. State v. Woods, 237 Ariz. 214 (2015). Declaring a mistrial "is the the most



1 drastic remedy for trial error” and should be granted “only when justice will be thwarted if the  
2 current jury is allowed to consider the case.” Id. quoting State v. Nordstrom, 200 Ariz 229 (2001). It  
3 is reasonable to consider that the jury may not have, in fact, been prejudiced by the improperly  
4 admitted exhibits.

5 It is the State’s position that exhibit 8 has no material value to prejudice or offer advantage  
6 to the State or the Defendant. Furthermore, the relevant contents of exhibit 17 are already in  
7 evidence, taken as testimony from Ann Roberts, Esq., and Adele Drumlevitch, Esq. For this reason,  
8 the State contents exhibit 17 will not have any material value to diminish or enhance any facts not  
9 already in evidence. However, in an effort to ensure the Defendant has not been prejudiced and in  
10 the interests of justice, the State respectfully requests the Court poll the jury and inquire as to any  
11 potential material effect exhibits 8 and 17 may or may not have had (or will have) on this jury’s  
12 deliberation.

13 RESPECTFULLY SUBMITTED this 21st day of November, 2019.

14  
15   
16 Jason Lindstrom  
17 Deputy County Attorney

18 Copy of the foregoing  
19 mailed/delivered/faxed, this  
20 21st day of November, 2019, to:

21 The Honorable Laura Cardinal  
22 Judge of the Superior Court, Div. I  
23 Email: [dwatkins@courts.az.gov](mailto:dwatkins@courts.az.gov)

24 Paul Gattone, Esq.  
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*Attorney for the Defendant*

KeyCite Yellow Flag - Negative Treatment  
Distinguished by State v. Rivera, Ariz.App. Div. 2, August 8, 2016

237 Ariz. 214

Court of Appeals of Arizona,  
Division 2.

The STATE of Arizona, Appellee,

v.

**Tywan Demetrius WOODS**, Appellant.

No. 2 CA-CR 2014-0020.

|  
May 4, 2015.

### Synopsis

**Background:** Following hung jury in first trial and declaration of mistrial during second trial, defendant was convicted in the Superior Court, Cochise County, No. CR201000870, Ann R. Littrell, John F. Kelliher, Jr., JJ., of eight counts of aggravated assault, six counts of kidnapping, two counts of aggravated robbery, and two counts of armed robbery. Defendant appealed.

**Holdings:** The Court of Appeals, Kelly, P.J., held that:

[1] prior to declaring mistrial, trial court failed to determine whether there were feasible alternatives;

[2] trial court's failure was fundamental error; and

[3] State was not prejudiced by alleged damage done to victim's credibility after she testified.

Reversed and remanded with instructions.

Vasquez, J., dissented with opinion.

### West Headnotes (14)

#### [1] Criminal Law

⚖ Construction of Evidence

#### Criminal Law

⚖ Judgment, sentence, and punishment

On appeal, Court of Appeals views the facts in the light most favorable to sustaining a defendant's convictions and sentences.

#### [2] Criminal Law

⚖ Constitutional questions

Court of Appeals would review defendant's claim, that trial court's decision to declare mistrial following his second trial violated double jeopardy, only for fundamental error, where defendant did not object to the third trial on double jeopardy grounds. U.S.C.A. Const.Amend. 5.

#### [3] Criminal Law

⚖ Constitutional questions

A double jeopardy violation constitutes fundamental error. U.S.C.A. Const.Amend. 5.

#### [4] Criminal Law

⚖ Issues related to jury trial

In evaluating a double jeopardy claim, the Court of Appeals reviews the trial court's decision to declare a mistrial for an abuse of discretion. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

#### [5] Criminal Law

⚖ Discharge of Jury Without Verdict; Mistrial

#### Criminal Law

⚖ Fairness and justice in general

Declaring a mistrial is the most drastic remedy for trial error and should be granted only when justice will be thwarted if the current jury is allowed to consider the case.

1 Cases that cite this headnote

#### [6] Criminal Law

⚖ Presence and conduct of bystanders

Prior to declaring mistrial in defendant's second trial, trial court failed to make real effort to determine whether there were any feasible

## Motion for Mistrial

¶7 Rivera argues the trial court erred when it denied his motion for mistrial, and that he was deprived of a “fair trial by an impartial jury” in violation of his right to due process. A court’s refusal to grant a mistrial is reviewed for abuse of discretion. *State v. Naranjo*, 234 Ariz. 233, ¶ 73, 321 P.3d 398, 413 (2014). Constitutional claims are reviewed de novo. *Id.*

\*2 ¶8 Rivera does not cite, nor do we find, any cases addressing similar facts. However, we may take guidance from cases addressing whether a mistrial should be granted “based on a witness’s testimony.” In such instances, a court must consider two factors: “(1) whether the testimony called to the jurors’ attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors.” *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003); *see also State v. Bible*, 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993) (“[T]he trial judge is in the best position to evaluate ‘the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial.’”), *quoting State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983).

¶9 Rivera argues the jurors must have felt sympathy when they witnessed J.M.’s medical device leaking and his attendant “distress” from “just feet away.” He also claims, in light of J.M.’s testimony that his injury could have happened when he was pushed out of his wheelchair, the jury must have felt “prejudice against [Rivera], in addition to just plain horror.”

¶10 Although members of the jury may have felt some sympathy for J.M., we cannot say prejudice necessarily followed. *Cf. Bible*, 175 Ariz. at 597–98, 858 P.2d at 1200–01 (following outburst by murder victim’s father, court did not abuse discretion by instructing jury, “[y]ou notice we don’t tell you not to have emotion or not to have sympathy, just that you don’t base your decision on that”). Nor can we conclude, as Rivera suggests, the trial court’s questioning failed to provide “a reasonable basis to conclude [the jurors] were not influenced by” J.M.’s medical event. The court appropriately polled the jurors, employing multiple questions, and, based on the unanimous indication they could be fair and impartial, continued with the trial. *See State v. Woods*, 237 Ariz. 214, ¶ 27, 348 P.3d 910, 917 (App. 2015) (trial court abused

discretion by declaring mistrial without questioning jury about effect of exposure to potentially prejudicial material). Absent some indication of potential prejudice, no further questioning or measures were required. *See id.* ¶¶ 15, 18–19.<sup>1</sup>

¶11 Further, the court instructed the jury “not [to] be influenced by sympathy or prejudice,” an instruction the jury is presumed to have followed. *See State v. Nelson*, 229 Ariz. 180, ¶ 45, 273 P.3d 632, 642 (2012). And, as the state notes, the decision to convict Rivera of lesser-included offenses indicates the jury was not influenced by sympathy for J.M. *See State v. Anderson*, 199 Ariz. 187, ¶ 33, 16 P.3d 214, 220 (App. 2000) (argument that jury was inflamed undermined by acquittal of several offenses). We conclude the trial court did not abuse its discretion in denying Rivera’s motion for mistrial.

## “Multiplicitous” Conviction

¶12 Rivera argues on appeal, as he did below, that his conviction of both aggravated robbery and the lesser-included offense of robbery violates double jeopardy and requires this court to vacate the robbery conviction. “We review de novo whether double jeopardy applies.” *State v. Brown*, 217 Ariz. 617, ¶ 12, 177 P.3d 878, 882 (App. 2008).

\*3 ¶13 The double jeopardy clauses of the United States and Arizona Constitutions prohibit multiple prosecutions and punishments for the same offense, including “greater and lesser-included offenses,” which are considered the “same offense” for double jeopardy purposes. *State v. Garcia*, 235 Ariz. 627, ¶ 5, 334 P.3d 1286, 1288 (App. 2014). A defendant can be charged with multiple offenses for the same conduct only when “each offense ‘requires proof of a fact which the other does not.’” *State v. Jones*, 235 Ariz. 501, ¶ 13, 334 P.3d 191, 194 (2014), *quoting Blockburger v. United States*, 284 U.S. 299, 304 (1932).

¶14 Rivera’s indictments for armed robbery and aggravated robbery required proving non-common elements: the use of a weapon for armed robbery and the assistance of an accomplice for aggravated robbery. *See* §§ 13–1903, 13–1904. Robbery, however, is a lesser-included offense of both armed robbery and aggravated robbery. *See* §§ 13–1902 through 13–1904; *see also Garcia*, 235 Ariz. 627, ¶ 6, 334 P.3d at 1288–89 (To constitute a lesser-included offense, “the greater offense must require each element of the lesser



☞ Right to completion of trial by single tribunal

A defendant's valued right to have his trial completed by a particular tribunal must, in some instances, be subordinated to the public's interest in fair trials designed to end in just judgments.

#### [14] Double Jeopardy

☞ Right to completion of trial by single tribunal

A trial court must always temper the decision whether or not to abort a trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.

#### Attorneys and Law Firms

**\*\*912** Mark Brnovich, Arizona Attorney General, Joseph T. Maziarz, Section Chief Counsel, Phoenix, By Jonathan Bass, Assistant Attorney General, Tucson, Counsel for Appellee.

Harriette P. Levitt, Tucson, Counsel for Appellant.

Presiding Judge KELLY authored the opinion of the Court, in which Judge HOWARD concurred and Judge VÁSQUEZ dissented.

### OPINION

KELLY, Presiding Judge:

**\*216** ¶ 1 Following a jury trial, **Tywan Woods** was convicted of eight counts of aggravated assault, six counts of kidnapping, and two counts each of aggravated robbery and armed robbery. The trial court sentenced him to concurrent and consecutive prison terms totaling 78.5 years. On appeal, **Woods** argues the court violated his right not to be twice placed in jeopardy when it granted the state's motion for a mistrial without prejudice, permitting the state to try him again. **Woods** also argues the court erred by allowing an in-court identification of **Woods** and his vehicle. For the following reasons, we reverse **Woods's** convictions and sentences.

### Factual and Procedural Background

[1] ¶ 2 We view the facts in the light most favorable to sustaining **Woods's** convictions and sentences.<sup>1</sup> See *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App.2008). In November 2009, L.C., her four daughters, her boyfriend, W.W., and three of his friends were held captive at gunpoint by **Woods** and two other men who had entered L.C.'s home purportedly to engage in a drug transaction with W.W. and one of his friends. **Woods** and his companions stole the marijuana that they were supposed to have purchased. They also took L.C.'s car keys and driver's license, as well as electronic items, cash, and jewelry. **Woods** was charged with multiple counts of armed robbery, aggravated robbery, kidnapping, and aggravated assault.<sup>2</sup> The first trial resulted in a hung jury, and the trial court apparently declared a mistrial and ordered a new trial.

¶ 3 During **Woods's** second trial,<sup>3</sup> L.C. disrupted the proceedings, directed profanity and a racial epithet toward **Woods** in the presence of the jury, and apparently was stopped by police at or near the courthouse and arrested shortly thereafter. After the prosecutor informed the court that some jurors could have seen police activity outside the courthouse and may have known L.C. had been arrested, and the court reporter affirmed that two jurors had been overheard discussing the arrest, the court granted the state's motion for a mistrial. Following a **\*217** **\*\*913** third trial,<sup>4</sup> **Woods** was convicted and sentenced as set forth above. He timely appealed.

### Discussion

[2] [3] [4] ¶ 4 **Woods** argues "[t]he trial court erred in declaring a mistrial following the second trial and, therefore, the third trial violated [his] right against double jeopardy." He did not object to the third trial on double jeopardy grounds; therefore, we review only for fundamental error. See *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). A double jeopardy violation constitutes fundamental error. *State v. Price*, 218 Ariz. 311, ¶ 4, 183 P.3d 1279, 1281 (App.2008). "In evaluating a double jeopardy claim, we review the trial court's decision to declare a mistrial for an abuse of discretion." *State v. Aguilar*, 217 Ariz. 235, ¶ 7, 172 P.3d 423, 426 (App.2007).

[5] ¶ 5 Declaring a mistrial “is the most drastic remedy for trial error” and should be granted “only when justice will be thwarted if the current jury is allowed to consider the case.” *State v. Nordstrom*, 200 Ariz. 229, ¶ 68, 25 P.3d 717, 738 (2001). “[T]he state ‘must demonstrate manifest necessity for any mistrial declared over the objection of the defendant,’ and the burden ‘is a heavy one.’” *Gusler v. Wilkinson*, 199 Ariz. 391, ¶ 18, 18 P.3d 702, 706 (2001), quoting *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

[6] ¶ 6 At Woods's second trial, L.C. frequently used profanity in her testimony and expressed extreme contempt for the men who had held her children captive. While one of her daughters was testifying, L.C. interrupted the questioning. Woods's counsel asked the court to admonish L.C., and the court told her, “You need to keep quiet.” L.C. responded that she would leave the courtroom, but before leaving, accused Woods of holding her children “hostage,” and directed profanity and a racial epithet toward him.

¶ 7 Woods moved for a mistrial, arguing that what L.C. had said was “totally inflammatory” and “very prejudicial.” The state responded that L.C. had not said “anything different than what she said on the stand.” The trial court agreed that “[i]t was very much in keeping with her angry outbursts during her testimony” and denied the motion for a mistrial.

¶ 8 The court admonished the jury to “disregard [L.C.'s] angry outbursts and what she said on her way out of this courtroom.” Woods then asked the court to remove the admonishment because L.C. was a witness and “the jury can consider her demeanor as she is going out as part of her testimony in this case.” The court told the jury it was “withdrawing [its] prior instruction to you, and allowing you to consider what [L.C.] said as she left the courtroom, to the extent that you deem it relevant and appropriate to do so.”

¶ 9 The next day, before the jury was brought in, the trial court stated there had been “matters that happened outside of the presence of the jury that are of concern.” Woods's counsel told the court there had been “commotions going on outside” the courtroom after L.C. left.<sup>5</sup> The trial court commented that after L.C. had left the courtroom the day before, “one could hear from inside the courtroom the sound of a woman yelling,” although the specific words could not be heard. The court also noted there had been a “banging” and then “some sound, commotion outside of the court.” The court stated

it believed the jury “could probably also hear yelling and banging and some noise from outside.”

¶ 10 The prosecutor told the trial court he had seen “law enforcement officers ... clearing the scene” and “they were still present when the jury was allowed to exit the front of the court.” According to the court, the jurors “certainly knew that [L.C.] had been stopped.” The prosecutor told the court he \*218 \*\*914 “had some concern about the fact that they were seeing what was still being cleaned up or cleared out in front of the courthouse.” The court stated it understood L.C. had been arrested later near the courthouse, and the court reporter nodded affirmatively when asked whether she had heard two jurors “discussing that the person being arrested ... was [L.C.]”

¶ 11 The state moved for a mistrial, citing concerns about “the defendant's ability to receive a fair trial from this jury at this point,” but it did not articulate how Woods might have been prejudiced by L.C.'s behavior. Woods stated that he “would prefer to continue with the trial.” The trial court explained that one of the incidents the day before would not alone have been sufficient for a mistrial, “[b]ut, cumulatively, I am concerned that the defendant, well, and the State for that matter, would be denied a fair trial, that the jury would not be making decisions based on the evidence presented here in court, but extraneous matters.” The court did not explain the basis for its concern that Woods would be denied a fair trial based on L.C.'s outburst. The court then granted without prejudice the state's motion for a mistrial without making a specific finding that there was manifest necessity for its ruling.

[7] [8] ¶ 12 As noted above, the state bears the burden of “demonstrat[ing] ‘manifest necessity’ for any mistrial declared over the objection of the defendant,” and the burden “is a heavy one.” *Washington*, 434 U.S. at 505, 98 S.Ct. 824. Indeed, “the words ‘manifest necessity’ appropriately characterize the magnitude of the prosecutor's burden.” *Id.* Although the trial court here did not make a specific finding of manifest necessity, if there is “sufficient justification” for the court's ruling, “the failure to explain that ruling more completely does not render it constitutionally defective.” *See id.* at 516–17, 98 S.Ct. 824.

¶ 13 We agree with the trial court's assessment that no information was conveyed during L.C.'s outburst other than her belief that Woods had held her children hostage and that she harbored animosity toward Woods, which already were apparent to the jury from L.C.'s testimony. In a similar

context, the jury in *State v. Bible* heard the victim's father refer to the defendant as "[t]hat f[\* \* \*]ing a[\* \*]hole." 175 Ariz. 549, 597, 858 P.2d 1152, 1200 (1993) (second and third alteration added, remaining alteration in *Bible*). The trial court admonished the jury to disregard the outburst and excluded the victim's father from the courtroom for the remainder of the trial. *Id.* The court denied Bible's motion for a mistrial, stating, "I don't think it's really the substance for a mistrial. I don't think there is any doubt in the jury's mind about how [the victim's father] feels about Mr. Bible. That's certainly been clear for days." *Id.* at 597–98, 858 P.2d at 1200–01 (alteration in *Bible*). Our supreme court noted that "[n]o information was conveyed other than the father's animosity toward Defendant, a feeling that could hardly have surprised the jurors." *Id.* at 598, 858 P.2d at 1201. The court concluded that the trial court did not abuse its discretion in denying Bible's motion for a mistrial. *Id.*

¶ 14 In addition to observing L.C.'s outburst in the courtroom, the jurors presumably heard commotion outside the courtroom after she left. They also might have seen police vehicles outside the courthouse and at least two may have known L.C. had been arrested. But, as the trial court acknowledged, much of the commotion took place outside the presence of the jury. According to the court, it was the cumulative effect of L.C.'s outburst and the events that followed that led it to grant the state's motion for a mistrial.

¶ 15 Our supreme court has stated that when the trial court fails to make a "real effort to determine whether there were any feasible alternatives to declaring a mistrial," there is no manifest necessity for a mistrial. *McLaughlin v. Fahringer*, 150 Ariz. 274, 277–78, 723 P.2d 92, 95–96 (1986). Here, the court could have but did not ask the jurors whether any extraneous information might have come to their attention. In *Evans v. Abbey*, a juror engaged a witness in conversation about the case. 130 Ariz. 157, 158, 634 P.2d 969, 970 (App.1981). We concluded the trial court had abused its discretion in declaring a mistrial over the defendant's objection \*219 \*\*915 when the court "did not attempt to determine whether the jury was prejudiced by the alleged misconduct and where such inquiry might have led the court to correct the situation with the mere dismissal of the individual juror." *Id.* at 160, 634 P.2d at 972.

¶ 16 Importantly, the trial court made no findings regarding what the jurors saw or heard after L.C. left the courtroom. Instead, the court simply asked Woods's attorney to repeat what he apparently had told the court in chambers. The

court also described what it had heard after L.C. left and stated it "believe[d] ... the jury could probably also hear" the commotion. Even if we assume the jurors heard the commotion in the hall outside the courtroom, we do not know whether they connected the police presence outside the courthouse to L.C.'s conduct. And, although the court assumed the jurors knew L.C. had been stopped, the only information the court had was the prosecutor's statement that there was still a police presence outside the courthouse when the jurors were allowed to leave. There is no indication L.C. was still at the courthouse when the jurors left; the court stated the police had addressed the situation and had "allowed her to drive away."

¶ 17 Moreover, we cannot be certain, even from the court reporter's account, why any jurors might have believed L.C. had been arrested, since she apparently had been permitted to leave the courthouse and was arrested elsewhere some time later. Although the court stated it understood that L.C. "was later arrested just up the canyon," there was no explanation of the reason for her arrest. Nor do we know whether the two jurors the court reporter overheard "discussing that the person being arrested ... was [L.C.]" shared that information with any of the other jurors.

¶ 18 In this case, had any jurors responded affirmatively when asked whether they had seen or heard L.C.'s outburst and the ensuing commotion, the trial court could have inquired whether that information affected their ability to remain impartial. *See Evans*, 130 Ariz. at 160, 634 P.2d at 972 (approving inquiry into whether jury prejudiced by alleged misconduct before ordering mistrial). By failing to do so, the court was unable to consider whether any jurors who could no longer be impartial could be dismissed with alternate jurors seated in their place—an option potentially available because the fourteen-juror panel provided for two alternates.

¶ 19 Another option available to the trial court was a curative instruction and admonishment to the jury to disregard any commotion or conduct by L.C. after she left the courtroom. In *Jones v. Kiger*, 194 Ariz. 523, ¶ 4, 984 P.2d 1161, 1163 (App.1999), a witness gave hearsay testimony that a defendant asserted "was prejudicial and antagonistic to her defense." Her co-defendant "insisted that the hearsay testimony was not prejudicial to his case and requested that the trial continue." *Id.* ¶ 5. In concluding that the trial court had abused its discretion in granting a mistrial over the co-defendant's objection, we noted that the court "could have ... admonished the jury not to consider" the testimony. *Id.* ¶ 12.

Here, although **Woods** had indicated the day before that he did not want a curative instruction, it appears the court did not consider the possibility of giving another curative instruction when the state moved for a mistrial and **Woods** objected.

¶ 20 Perhaps most importantly, the court did not address **Woods's** desire to continue with the trial despite the disruption. See *id.* ¶ 9. In *Jones*, we pointed out that the trial court “ignored defense counsel’s assertion that his case was not damaged [by the hearsay testimony] without considering why that might be true.” *Id.* ¶ 10. We stated that, although “[t]he trial court is usually in the best position to determine whether manifest necessity requires a mistrial,” the court “must recognize that the defendant has a significant interest in deciding whether to take the case from the jury and ‘retains primary control over the course to be followed in the event of such error.’” *Id.* ¶ 9, quoting *United States v. Dinitz*, 424 U.S. 600, 609, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) (alteration in *Jones*). We further observed that “‘a defendant may have valid personal reasons to prefer going ahead with the trial rather than beginning the entire process anew,’” and we stated the trial judge “‘must avoid depriving the defendant of his constitutionally \*220 \*\*916 protected freedom of choice in the name of a paternalistic concern for his welfare.’” *Id.* ¶ 9, quoting *Curry v. Superior Court*, 2 Cal.3d 707, 87 Cal.Rptr. 361, 470 P.2d 345, 351 (1970).

¶ 21 Here, **Woods** stated he “want[ed] to resolve the issue” because he had “been going through this already for two-and-a-half years” and that the multiple trials were “affecting [him] with [his] jobs” and “supporting [his] family.” The court made no further inquiry after **Woods** stated he preferred to continue with the trial. See *Barton v. Commonwealth*, 385 Mass. 517, 432 N.E.2d 524, 526 (1982), citing *Washington*, 434 U.S. at 516–17, 98 S.Ct. 824 (“An appellate court will be deferential to the judge’s discretionary determination that manifest necessity exists only if it is clear from the record that the judge has given careful consideration to the available alternatives and to the defendant’s interest in having the trial concluded in a single proceeding.”).

[9] ¶ 22 We conclude the trial court abused its discretion by granting a mistrial, and **Woods's** third trial violated his right to be free from double jeopardy and was fundamental error.

#### The Dissent

¶ 23 Our dissenting colleague disagrees with our conclusion that the trial court failed to make a “real effort” to determine whether there were feasible alternatives to ordering a mistrial, asserting that the court did not need to poll the jurors to determine how much of the commotion following L.C.’s outburst they had observed and whether they nevertheless could remain impartial. But because the court did not poll the jurors, we are left to speculate as to what they might have seen or heard after L.C. left the courtroom. As detailed above, the record does not establish that the jurors saw police arresting L.C. or that the two jurors the court reporter overheard discussing L.C.’s arrest shared that information with any other jurors.

[10] ¶ 24 Our dissenting colleague acknowledges the trial court “could have polled the jurors about their ability to remain impartial despite their observations of L.C.’s outburst and the ensuing commotion” but states polling the jury was unnecessary because “absolute necessity is not required” before declaring a mistrial. But a “high degree” of necessity is required, see *Washington*, 434 U.S. at 506, 98 S.Ct. 824, and polling the jury would have established whether any jurors could no longer be impartial as a result of events that occurred outside the courtroom. Under any standard, the court is required to consider alternatives. Because the court did not pursue the alternative of polling the jurors, and therefore did not know what they might have seen or heard, we cannot agree there was a “high degree” of necessity for a mistrial.<sup>6</sup>

[11] ¶ 25 Moreover, neither the state nor the trial court articulated any prejudice to **Woods** resulting from L.C.’s conduct. In denying **Woods's** motion for a mistrial the day before, the court noted that L.C.’s behavior as she left the courtroom was no different from her behavior during her testimony, in which she used obscenities to refer to **Woods**. In granting the state’s motion for a mistrial, the court made no assessment of the prejudice to **Woods** as a result of L.C.’s conduct after she left the courtroom. And although the court indicated it also was concerned about the state’s ability to receive a fair trial, neither the court nor the state articulated any prejudice to the state resulting from L.C.’s behavior. The outburst might have damaged L.C.’s credibility, but any damage to her credibility would have been done by the time she had finished testifying, and we do not see how L.C.’s further damaging her own credibility can be said to deprive the state of a fair trial. Moreover, L.C. was not the only witness who identified **Woods** as one of the assailants. Thus, her testimony was not essential, and any damage to her credibility did not significantly prejudice \*221 \*\*917



the state's case. See *Morris v. Livote*, 105 A.D.3d 43, 962 N.Y.S.2d 59, 62 (2013).

[12] ¶ 26 Our dissenting colleague states that the record “suggests the court was aware of the option of giving an instruction but implicitly chose not to do so” because it had given a curative instruction the day before after denying **Woods's** motion for a mistrial. But the situation had changed and alternatives needed to be re-considered. Although it is correct that “[a] trial court has acted within its sound discretion in rejecting possible alternatives and in granting a mistrial, if reasonable judges could differ about the proper disposition, even though ‘[i]n a strict literal sense, the mistrial [is] not necessary,’ ” *State v. Givens*, 161 Ariz. 278, 281, 778 P.2d 643, 646 (App.1989), quoting *Washington*, 434 U.S. at 511, 98 S.Ct. 824 (first alteration added, remaining alterations in *Givens* ), that principle assumes that the trial court in fact first considered and then rejected alternatives. But we are not willing to assume that the court here considered alternatives in response to the state's motion for a mistrial when it states its reasons for the mistrial on the record and does not indicate it considered them. See *Barton*, 432 N.E.2d at 526, citing *Washington*, 434 U.S. at 516–17, 98 S.Ct. 824.

¶ 27 The trial court had no reasoned basis to reject the obvious alternative of polling the jurors to determine what their exposure to L.C.'s misconduct had been and how it had affected them, if at all. Indeed, courts commonly require trial judges to poll jurors when their impartiality is called into question. See, e.g., *State v. Phillips*, 74 Ohio St.3d 72, 656 N.E.2d 643, 660–61 (1995) (trial court that learns of improper outside communication with juror must hold hearing to determine whether communication biased juror); *Artis v. United States*, 554 A.2d 327, 331 (D.C.1989) (holding that trial court “was under an obligation to investigate the possibility of juror prejudice by more than a perfunctory poll of the jury”); *People v. McNeal*, 90 Cal.App.3d 830, 838, 153 Cal.Rptr. 706 (1979) (“Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the factual explanation for that possibility.”); cf. *People v. Castillo*, 144 A.D.2d 376, 534 N.Y.S.2d 188, 189 (1988) (denial of defendant's motion for mistrial not an abuse of discretion where trial court “conducted a painstakingly thorough and searching inquiry of each juror individually, thereby discovering the nature and extent of the misconduct and its effect upon the members of the jury”).

¶ 28 *Washington* and *Simmons v. United States*, 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891), do not persuade us that the trial court here did not abuse its discretion by failing to poll the jury because in both of those cases, the jury's exposure to potentially prejudicial information was evident. In *Washington*, the trial court ordered a mistrial because the defendant's counsel “made improper and prejudicial remarks during his opening statement to the jury.” 434 U.S. at 510, 98 S.Ct. 824. In *Simmons*, the defendant's counsel sent to the newspapers a copy of a letter denying the truth of statements made by an individual who claimed a juror was acquainted with the defendant. 142 U.S. at 149, 12 S.Ct. 171. The substance of the letter was published in the newspapers, and the jurors stated they had read the letter. *Id.* at 149–50, 12 S.Ct. 171. In both cases, the trial court could be certain the jurors had received information that could affect their ability to remain impartial. Here, as discussed above, there was no way for the trial court to know, without polling the jury, exactly what the jurors had heard or observed.

[13] [14] ¶ 29 Our dissenting colleague does not address the fact that the trial court ordered a mistrial over **Woods's** objection, thereby depriving him of his “ ‘valued right to have his trial completed by a particular tribunal.’ ” *United States v. Jorn*, 400 U.S. 470, 484, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), quoting *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949). It is true, as the dissent points out, that the defendant's “valued right ... must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.” *Id.* at 480, 91 S.Ct. 547. But the trial court “must always temper the decision whether or not to abort the trial by considering the \*222 \*\*918 importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.” *Id.* at 486, 91 S.Ct. 547. This, we conclude, the trial court did not do.

### Disposition

¶ 30 For the foregoing reasons, we reverse **Woods's** convictions and sentences and remand to the trial court with instructions to dismiss the case with prejudice.<sup>7</sup>

VÁSQUEZ, Judge, dissenting:

¶ 31 As the majority points out, our supreme court has stated that when a trial court fails to make a “real effort

to determine whether there were any feasible alternatives to declaring a mistrial," there is no manifest necessity for a mistrial. *McLaughlin v. Fahringer*, 150 Ariz. 274, 277, 723 P.2d 92, 95 (1986). Relying on this principle, the majority reverses **Woods's** convictions with prejudice, concluding the trial court did not consider the alternatives of polling the jury and giving a curative instruction. I respectfully dissent because I disagree that the court in this case failed to make a "real effort" to consider feasible alternatives to a mistrial and the record establishes manifest necessity.

¶ 32 Because "[t]he trial court is usually in the best position to determine whether manifest necessity requires a mistrial," we review its decision for an abuse of discretion. *Jones v. Kiger*, 194 Ariz. 523, ¶¶ 9–10, 984 P.2d 1161, 1164 (App.1999). "The words 'manifest necessity' ... do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Arizona v. Washington*, 434 U.S. 497, 505–06, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). Thus, "the degree of deference [we] should accord the trial court depends on the circumstances that gave rise to the mistrial." *State v. Aguilar*, 217 Ariz. 235, ¶ 13, 172 P.3d 423, 427 (App.2007). At one extreme, "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence." *Washington*, 434 U.S. at 508, 98 S.Ct. 824. "At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict." *Id.* at 509, 98 S.Ct. 824.

¶ 33 In *Washington*, the Supreme Court stated that defense counsel's improper and prejudicial arguments to the jury "may have affected the impartiality of the jury" and "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation." *Id.* at 510–11, 98 S.Ct. 824; *see also United States v. Chapman*, 524 F.3d 1073, 1082 (9th Cir.2008) (when trial court's decision based on "own observations and personal assessment," we must give special deference). Similarly, here, L.C.'s outbursts and subsequent commotion clearly were improper and may have affected the impartiality of the jury. Although nothing in the record suggests that either party caused or provoked the outbursts and commotion, in my view, the majority nevertheless improperly applies the strictest scrutiny in evaluating the trial court's decision.

¶ 34 Notably, the state's motion for a mistrial was content neutral. The prosecutor stated:

With everything that has been said, your Honor, and everything that, that has gone before, even the events of yesterday afternoon, or last evening, I now become concerned that we have a jury that, that may have a reduced ability to be fair and impartial in this matter.

The prosecutor made the motion "in the interest of justice and out of concern for the defendant's right to a fair trial," but he also stated that he was inclined to withdraw it if **Woods** did not join. When the trial court asked, "are you inclined to, or are you," the prosecutor made clear:

I don't want there to be any confusion about the State's intention to bring this matter to verdict, whether it be this jury or a subsequent jury. So if the Court \*223 \*\*919 believes that the State's motion may be a waiver of that right, or result in a situation where the State would be precluded from retrying the defendant, I can't allow that to be the end result.

....

So, again, if the Court has any concern about the State's right to retry this matter if a mistrial is granted, then I'll withdraw the motion.

Thus, contrary to the majority's assertion, the prosecutor's position was not equivocal. *Supra*, n. 6. And, given that position, it is clear the court considered whether **Woods** could be retried in making its determination and believed it had no other option but to declare a mistrial. In contrast, the majority's decision punishes the state in the exact way the prosecutor sought to avoid.

¶ 35 Both the defendant and the state have a right to a trial decided by a fair and impartial jury. *Washington*, 434 U.S. at 516, 98 S.Ct. 824; *State v. Reynolds*, 11 Ariz.App. 532, 534, 466 P.2d 405, 408 (1970). "[T]he defendant's right to a single trial 'must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.' " *Aguilar*, 217 Ariz. 235, ¶ 10, 172 P.3d at 426, *quoting Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949). In this case, the trial court perceived an escalating series of events involving L.C. that culminated in its determination



that the process was unfair to both **Woods** and the state.<sup>8</sup> Although **Woods** opposed the state's motion for a mistrial, this is nonetheless a determination to which we owe great deference. See *Washington*, 434 U.S. at 510–11, 98 S.Ct. 824. “In short, [the trial court] is far more ‘conversant with the factors relevant to the determination’ than any reviewing court can possibly be.” *Id.* at 514, 98 S.Ct. 824, quoting *Wade*, 336 U.S. at 689, 69 S.Ct. 834.

¶ 36 I recognize our inquiry does not end with a determination that the trial court is entitled to great deference. We must be satisfied the court has “exercised ‘sound discretion’ in declaring a mistrial.” *Id.* As the Supreme Court stated in *Washington*, a trial court's decision cannot be upheld if it “acts irrationally or irresponsibly.” *Id.* In this case, the court did not act irrationally or irresponsibly.

¶ 37 The majority first concludes the trial court “could have but did not ask the jurors whether any extraneous information might have come to their attention.” *Supra*, ¶ 15. But the record shows that polling the jury on this issue was not necessary because it is evident that the jurors were exposed to potentially prejudicial information. When discussing the incident with counsel, the court noted that after L.C. had left the courtroom, “one could hear from inside the courtroom the sound of a woman yelling,” “banging,” and “commotion outside of the court.” The court further stated the jury “could probably also hear [the] noise from outside.” The prosecutor informed the court that law enforcement officers were still outside “clearing the scene ... when the jury was allowed to exit the front of the courthouse.” The court thus reasonably concluded that the jury “knew ... [L.C.] had been stopped” by police. And, the court's belief was confirmed when the court reporter indicated she had heard two jurors “discussing that the person being arrested ... was [L.C.]” **Woods** does not dispute any of this on appeal. Because the record already contained sufficient evidence that the jurors had witnessed the commotion involving L.C., polling the jury on this issue would have served little purpose.

¶ 38 Ideally, as the majority points out, the trial court also could have polled the jurors about their ability to remain impartial despite their observations of L.C.'s outburst and the ensuing commotion. *Supra*, ¶ 18. Because there were two alternate jurors, the court potentially could have dismissed only those who could not proceed. But, although the record does not show a mistrial was \*224 \*\*920 absolutely necessary, “absolute necessity is not required” before declaring a mistrial. *Aguilar*, 217 Ariz. 235, ¶ 14, 172

P.3d at 427. “A trial court has acted within its sound discretion in rejecting possible alternatives and in granting a mistrial, if reasonable judges could differ about the proper disposition, even though ‘[i]n a strict literal sense, the mistrial [is] not necessary.’” *State v. Givens*, 161 Ariz. 278, 281, 778 P.2d 643, 646 (App.1989), quoting *Washington*, 434 U.S. at 511, 98 S.Ct. 824 (alterations in *Givens*). Indeed, the Supreme Court has cautioned against a “mechanical,” per se rule, instead adopting a “flexible standard,” which gives the trial court “broad discretion.” *Illinois v. Somerville*, 410 U.S. 458, 462, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973).

¶ 39 The majority also concludes the trial court could have given “a curative instruction and admonishment to the jury to disregard any commotion or conduct by L.C. after she left the courtroom.” *Supra*, ¶ 19. The record does not show that the court explicitly considered giving a curative instruction in response to the state's request for a mistrial. But explicit findings on alternatives to a mistrial are not required, see *Washington*, 434 U.S. at 501, 516–17, 98 S.Ct. 824; *Givens*, 161 Ariz. at 281–82, 778 P.2d at 646–47, and the record suggests the court was aware of the option of giving an instruction but implicitly chose not to do so.

¶ 40 In denying **Woods's** earlier motion for a mistrial based on L.C.'s in-court outburst, the trial court instead decided to give a curative instruction, admonishing the jury to disregard L.C.'s statements. But, at **Woods's** urging, the court later withdrew that instruction. Thus, the record shows the court was fully aware of this alternative—and **Woods's** opposition to it—when it granted the state's motion for a mistrial the following day. See *State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App.2008) (we assume trial court knows and applies law). Moreover, “curative instructions ... ‘will not necessarily remove the risk of bias.’” *State v. Gallardo*, 225 Ariz. 560, ¶ 6, 242 P.3d 159, 163 (2010), quoting *Washington*, 434 U.S. at 513, 98 S.Ct. 824; see also *State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993) (“[T]here could be instances where a curative instruction may be inadequate....”). And, the trial court was in the best position to make that determination based on the escalating circumstances. See *Jones*, 194 Ariz. 523, ¶ 9, 984 P.2d at 1164.

¶ 41 Based on the record before us, I cannot agree that the trial court abused its discretion by declaring a mistrial. See *id.* ¶ 10. The circumstances leading to the court's declaration of a mistrial spanned two days. Notably, **Woods** considered L.C.'s outburst the first day to be so egregious that he moved for a mistrial. **Woods** clearly believed he was prejudiced by

L.C.'s conduct to merit requesting a mistrial at that point. As to the state's motion for a mistrial made on the second day, the majority takes issue with the fact that neither the state nor the court articulated any prejudice to **Woods** or the state resulting from L.C.'s conduct. *Supra*, ¶ 25. But, given **Woods's** own motion for a mistrial, and the escalating circumstances leading to the court's determination, I do not believe such articulation was necessary. *See Washington*, 434 U.S. at 516–17, 98 S.Ct. 824 (trial court did not need to articulate on record all factors influencing decision to grant mistrial where basis for decision was “adequately disclosed by the record”). It is undisputed that the jury observed L.C.'s outburst as she was leaving the courtroom, that the jury presumably heard the commotion outside, and that the court reporter informed the court that at least two of the jurors had discussed L.C.'s arrest. Any prejudice thus became that much more apparent from the record. In addition, the state's ability to receive a fair trial was equally implicated by these events.

¶ 42 The trial court “gave both defense counsel and the prosecutor full opportunity to explain their positions

on the propriety of a mistrial.” *Id.* at 515–16, 98 S.Ct. 824. In addition, there were multiple in-chambers and off-the-record conversations among the court and counsel, further demonstrating that the court “acted deliberately,” not “abruptly.” *Chapman*, 524 F.3d at 1082. Given **Woods's** own request for a mistrial for similar but less egregious circumstances, the court's decision is “entitled to special respect \*225 \*\*921 *Washington*, 434 U.S. at 510, 515–16, 98 S.Ct. 824, because it was in the best position, having just heard counsel's arguments and assessed the situation over a two-day period, *see also Jones*, 194 Ariz. 523, ¶¶ 9–10, 984 P.2d at 1164. I thus cannot agree the court abused its discretion by declaring a mistrial. And, based on the foregoing, I conclude **Woods's** right against being twice placed in jeopardy was not violated and dismissing the charges against him with prejudice is unwarranted and does not serve the interests of justice.

#### All Citations

237 Ariz. 214, 348 P.3d 910, 712 Ariz. Adv. Rep. 4

#### Footnotes

- 1 **Woods's** opening brief contains nearly twenty pages of facts, most of which are wholly irrelevant to the issues presented for our review. *See* Ariz. R.Crim. P. 31.13(c)(1)(iv) (appellant's brief shall include “[a] statement of facts relevant to the issues presented for review”).
- 2 The state dismissed a number of counts before **Woods's** second trial.
- 3 Judge Ann R. Littrell presided over **Woods's** second trial and entered the mistrial ruling that is at issue here.
- 4 Judge John F. Kelliher Jr., presided over the third trial.
- 5 Although **Woods's** counsel reported to the trial court that L.C. and some spectators had made threats against **Woods**, his counsel, and the prosecutor, these alleged threats were made outside the courtroom and not in the presence of the jury.
- 6 As our dissenting colleague correctly points out, the state made clear it wanted the trial court to order a mistrial only if it could re-try **Woods**. But the state's equivocal position indicates it may have had some concern about whether there was manifest necessity for a mistrial. And the state claimed to be concerned about **Woods's** ability to receive a fair trial, not its own. Finally, the dissent does not explain how the state's position below affects the double jeopardy analysis.
- 7 Because we reverse **Woods's** convictions and sentences, we need not address his argument that the trial court in his third trial erred by allowing an in-court identification of **Woods** and his vehicle.
- 8 The majority acknowledges that some of the trial spectators had made threats against **Woods** and the attorneys outside the jury's presence. *Supra*, n. 5. However, the spectators also made comments that at least one individual “pretty strongly [thought] w[ere] heard by the jury.” The spectators also engaged in “inappropriate behavior,” which included one spectator “changing [his] shirt in the middle of [the] jury proceeding.” These incidents presumably added to the escalating series of events with which the trial court was concerned.

2016 WL 4177541

Only the Westlaw citation is currently available.  
THIS DECISION DOES NOT CREATE LEGAL  
PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. NOT FOR PUBLICATION See Ariz.  
R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.  
Court of Appeals of Arizona,  
Division 2.

The State of Arizona, Appellee,  
v.  
David Bryan Rivera, Appellant.

No. 2 CA-CR 2015-0201

Filed August 8, 2016

Appeal from the Superior Court in Pima County; No.  
CR20142849001; The Honorable Javier Chon-Lopez, Judge.  
**AFFIRMED IN PART AS MODIFIED; REVERSED IN  
PART**

#### Attorneys and Law Firms

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Judge Staring authored the decision of the Court, in which  
Presiding Judge Howard and Judge Espinosa concurred.

#### MEMORANDUM DECISION

STARING, Judge:

\*1 ¶1 After a jury trial, David Bryan Rivera was convicted  
of second-degree burglary, robbery, and aggravated robbery.  
On appeal, he claims the trial court erred by denying his  
motion for a mistrial made after a medical device attached  
to the victim's arm suddenly began leaking bodily fluids  
in the courtroom, in the presence of the jury. Rivera also  
claims one of his convictions was "multiplicitous" to another  
count, and disputes the trial court's calculation of presentence

incarceration credit. For the reasons explained below, we  
affirm in part, with modification, and vacate in part.

#### Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming  
Rivera's convictions and sentences. See *State v. Cropper*, 205  
Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In June 2014, Rivera  
and an accomplice broke a window and entered the apartment  
of J.M. The accomplice pushed J.M. out of his wheelchair,  
and both men searched J.M.'s clothing and apartment. J.M.  
claimed both men pointed guns at him, and that Rivera put a  
gun to his head and threatened to shoot if he did not reveal  
where he kept his cash.

¶3 Rivera and his accomplice took electronics, cash and  
medical marijuana, leaving J.M. on the floor. J.M. was able  
to identify Rivera because they occasionally drank and used  
marijuana together. Rivera was arrested the following day  
and charged with first-degree burglary, kidnapping, armed  
robbery, and aggravated robbery.

¶4 At the time of the trial, J.M. had been seriously ill and he  
was temporarily released from the hospital so he could testify.  
At the conclusion of his testimony, a medical device attached  
to his upper arm began to leak, spilling blood and bodily fluid  
onto his arm and the courtroom floor. The proceedings were  
halted, and the court ordered a recess so the floor could be  
cleaned.

¶5 Rivera moved for a mistrial, which the trial court denied.  
The court then apologized to the jury and asked whether  
anyone felt too uncomfortable to continue, too emotionally or  
otherwise impacted to be "fair and impartial," or unable to be  
fair and impartial because of "sympathy for the victim." None  
of the jurors responded affirmatively, and the trial continued.

¶6 The jury acquitted Rivera of armed robbery and first-  
degree burglary, but found him guilty of the lesser-included  
offenses of robbery and burglary in the second degree. See  
A.R.S. §§ 13-1507, 13-1508, 13-1902, 13-1904. The jury  
also found Rivera guilty of aggravated robbery, see A.R.S.  
§ 13-1903, but failed to reach a verdict on the kidnapping  
charge, which the state later dismissed. The court sentenced  
Rivera to concurrent sentences of 11.25 years for burglary  
and aggravated robbery and ten years for robbery. This appeal  
followed. We have jurisdiction pursuant to A.R.S. §§ 12-  
120.21, 13-4031, and 13-4033.

alternatives to mistrial based on cumulation of victim's outburst at trial, commotion involving victim outside of courtroom, and jurors' knowledge that victim had been arrested near the courthouse; trial court made no findings regarding what jurors saw or heard after victim left courtroom, without asking jurors whether their seeing or hearing victim's outburst and ensuing commotion affected their ability to remain impartial, court was unable to consider whether any jurors who could no longer be impartial could be dismissed with alternate jurors seated in their place, court could have given curative instruction and admonishment to jury to disregard any commotion or conduct by victim after she left courtroom, and court did not address defendant's desire to continue with trial despite disruption.

[7] **Criminal Law**

⚖ Evidence

**Double Jeopardy**

⚖ Manifest necessity; other grounds

The state bears the burden of demonstrating manifest necessity for any mistrial declared over the objection of the defendant, and the burden is a heavy one; indeed, the words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden.

[8] **Double Jeopardy**

⚖ Manifest necessity; other grounds

Even if the trial court does not make a specific finding of manifest necessity for a mistrial declared over the objection of a defendant, if there is sufficient justification for the court's ruling, the failure to explain that ruling more completely does not render it constitutionally defective.

[9] **Criminal Law**

⚖ Constitutional questions

**Double Jeopardy**

⚖ Manifest necessity; other grounds

Trial court's failure to make real effort to determine whether there were any feasible alternative to mistrial based on cumulation of victim's outburst at trial, commotion involving victim outside of courtroom, and jurors' knowledge that victim had been arrested near the courthouse, prior to declaring mistrial in defendant's second trial, was fundamental error.

[10] **Criminal Law**

⚖ Necessity in general

While absolute necessity is not required before declaring a mistrial, a high degree of necessity is required, and, under any standard, the trial court is required to consider alternatives.

[11] **Criminal Law**

⚖ Presence and conduct of bystanders

Any damage to victim's credibility, following her outburst at trial, her involvement in commotion outside of courtroom, and jurors' knowledge that she had been arrested near the courthouse, was done by the time she finished testifying, and, thus, said damage did not significantly prejudice State's case, as to warrant declaring mistrial; victim's behavior as she left courtroom was no different from her behavior during her testimony, in which she used obscenities to refer to defendant, and, since victim was not the only witness who identified defendant, her testimony was not essential to State's case.

[12] **Criminal Law**

⚖ Necessity in general

Principle that a trial court has acted within its sound discretion in rejecting possible alternatives and in granting a mistrial, if reasonable judges could differ about the proper disposition, even though, in a strict literal sense, the mistrial is not necessary, is based on assumption that court in fact first considered and then rejected alternatives.

[13] **Double Jeopardy**

offense plus one or more additional elements not required by the lesser offense.”).<sup>2</sup> When the jury acquitted Rivera of armed robbery and instead convicted him of the lesser-included offense of robbery, the robbery count became the “same offense” as the aggravated robbery count for double jeopardy purposes. *See id.* ¶ 5.

¶15 The state has conceded this issue and agrees Rivera's conviction and sentence on the lesser-included offense should be vacated. We concur and therefore vacate Rivera's conviction and sentence for robbery.

### Presentence Incarceration Credit

¶16 Rivera also argues he is entitled to an additional thirteen days of presentence incarceration credit. The trial court's calculation of such is a question of law that we review de novo. *See State v. Bomar*, 199 Ariz. 472, ¶ 5, 19 P.3d 613, 616 (App. 2001). Although Rivera did not object below, a trial court's grant of insufficient presentence incarceration credit is fundamental error. *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989).

¶17 Rivera argues he was entitled to fifty-three days of presentence incarceration credit, rather than the forty days the trial court awarded. The state concedes this issue, as well, and

we agree. Section 13–712(B), A.R.S., entitles a defendant to full credit for “time actually spent in custody” for an offense prior to sentencing for the same offense. Rivera is entitled to ten days of credit for time spent in custody after his arrest but before he was released on bond and forty-three days for time spent in custody between his trial and sentencing. *See State v. Carnegie*, 174 Ariz. 452, 453–54, 850 P.2d 690, 691–92 (App. 1993) (“day of booking” counts towards presentence incarceration credit); *State v. Hamilton*, 153 Ariz. 244, 245–46, 735 P.2d 854, 855–56 (App. 1987) (day of sentencing counted against prison sentence, not presentence credit). Accordingly, we modify Rivera's sentence pursuant to A.R.S. § 13–4037 to include credit for fifty-three days of presentence incarceration. *See id.* at 246, 735 P.2d at 856.

### Disposition

¶18 We vacate Rivera's conviction and sentence for robbery, affirm Rivera's convictions for aggravated robbery and second-degree burglary, and modify his sentences to include credit for a total of fifty-three days of presentence incarceration.

### All Citations

Not Reported in P.3d, 2016 WL 4177541

### Footnotes

- 1 *Woods* involved a mistrial granted over the defendant's objection. *Id.* ¶ 11. The distinction is not significant here. Also, Rivera's reliance upon *Artis v. United States*, 554 A.2d 327 (D.C. 1989), is misplaced. In that case, the court erred by not conducting a hearing to determine whether any prejudice warranted a new trial. *Id.* at 332. But the situation involved a juror who twice failed to acknowledge that she knew the defendant personally. *Id.* at 330. In light of its awareness of potential prejudice with respect to a specific juror, “the court was under an obligation to investigate the possibility of juror prejudice by more than a perfunctory poll of the jury” as a whole. *Id.* at 331.
- 2 In *Garcia*, the court specifically identified “robbery [as] a lesser included offense of armed robbery.” *Id.* ¶ 7.